HAYEKIAN ANARCHISM

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George Mason University Law and Economics Research Paper Series

11-06

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Abstract:

Should law be provided centrally by the state or by some other means? Even relatively staunch advocates of competition such as Friedrich Hayek believe that the state must provide law centrally. This article asks whether Hayek's theories about competition and the use of knowledge in society should lead one to support centrally provided law enforcement or competition in law. In writing about economics, Hayek famously described the competitive process of the market as a "discovery process." In writing about law, Hayek coincidentally referred to the role of the judge under the common law as "discovering" the law in the expectations and conventions of people in a given society. We argue that this consistent usage was more than a mere semantic coincidence—that the two concepts of discovery are remarkably similar in Hayek's thought and that his idea of economic discovery influenced his later ideas about legal discovery. Moreover, once this conceptual similarity is recognized, certain conclusions logically follow: namely, that just as economic discovery requires the competitive process of the market to provide information and feedback to correct errors, competition in the provision of legal services is essential to the judicial discovery in law. In fact, the English common law, from which Hayek drew his model of legal discovery, was itself a model of polycentric and competing sources of law throughout much of its history. We conclude that for the same reasons that made Hayek a champion of market competition over central planning of the economy, he should have also supported competition in legal services over monopolistic provision by the state—in short, Hayek should have been an anarchist.

JEL Codes: B25, K10, P16, P51

Keywords: Friedrich Hayek, complexity in the law, legal pluralism, institutionalism, anarcho-liberalism

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1. Introduction

Should law be provided centrally by the state or by some other means? Many or perhaps most economists believe that members of society must choose between governmentally provided law or varying degrees of disorder (Buchanan, 1975; Bush and Mayer, 1974; Hirshleifer, 1995; Tullock, 2005). Even relatively staunch advocates of competition such as Friedrich Hayek believe that the state must provide law centrally. But are centrally provided law or disorder the only two options? In this article we take Friedrich Hayek's views on economic competition as the starting point and then ask whether accepting those ideas requires one to endorse the central provision of law. In writing about economics, Hayek famously described the competitive process of the market as a "discovery process." In writing about law, Hayek coincidentally referred to the role of the judge under the common law as "discovering" the law in the expectations and conventions of people in a given society. We argue that this consistent usage was more than a mere semantic coincidence—that the two concepts of discovery are remarkably similar in Hayek's thought. Moreover, once this conceptual similarity is recognized, certain conclusions logically follow: namely, that just as economic discovery requires the competitive process of the market to provide information and feedback to correct errors, competition in the provision of legal services is essential to the judicial discovery in law. In fact, the English common law, from which Hayek drew his model of legal discovery, was itself an example of polycentric and competing sources of law throughout much of its history (Stringham and Zywicki, 2010). We conclude that for the same reasons that made Hayek a champion of market competition over central planning of the economy, he should have also supported competition in legal services over monopolistic provision by the state—in short, Hayek should have been an anarchist.[1]

[1] Other authors such as Epstein (1999) have referred to a Hayekian socialism. The first person we know to use the phrase Hayekian anarchism is Peter Boettke (quoted in Sciabarra 2000, p. 239). By anarchism we refer to an anarchism

We do not argue that Hayek was, in fact, an anarchist. In fact, he expressly denied the position.[2] Our argument, instead, is that understanding the internal logic of Hayek's economic and legal systems compel the conclusion that Hayek should have embraced anarchism. And although it may seem inconceivable that Hayekian reasoning could lead to the conclusion that Hayek should have been an anarchist, it is worth noting that Hayek himself did not shy from the logical implications of his reasoning even when that logic led to some fairly radical conclusions. For example, Hayek (1976a) abandoned his earlier belief that government abuse of the monetary system could be contained and instead called for a system of competing currencies, what he called the denationalization of money. Frustrated by the unworkability and instability of monopoly provision of money by the government Hayek (1976a, p. 28) wrote, "It has the defects of all monopolies: one must use their product even if it is unsatisfactory, and, above all, it prevents the discovery of better methods of satisfying a need for which a monopolist has no incentive."[3] As suggested by his embrace of competing currency usage, over time Hayek increasingly embraced the idea that institutions such as money could emerge endogenously through competition and spontaneous order and that those institutions would be more responsive to individual needs and preferences than government-created institutions. Had he taken the next step and further applied his logic about "the defects of all monopolies," he would have written about the denationalization of law.

Although Hayek certainly did not come to the conclusion in this article, we argue that accepting that the provision of law is as complex as other market phenomena should lead one to question whether law should be centrally provided by the state. We argue that knowledge problems

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that does not rule out private property or markets, as certain conceptions of anarchism do. For an overview of this subject, see Osterfeld (1986), Benson (1990), Boettke (2005), Stringham (2005), and Powell and Stringham (2009).

[2] In a 1978 interview Hayek said, "Our spontaneous order of society is made up of a great many organizations, in a technical sense, and within an organization design is needed. And that some degree of design is even needed in the framework within which this spontaneous order operates, I would always concede; I have no doubt about this. Of course, here it gets into a certain conflict with some of the modern anarchists."

[3] Note Hayek's observation that a cost of monopoly is not its static inefficiency but its inability to *discover* better methods of doing things.

and accountability problems prevent a centralized legal system from providing law in a manner that holds up to Hayek's ideals. This essay is not an exercise in "What did Hayek really mean?"[4] Hayek is no longer alive, so our goal is not to convince him, but to make the case to people influenced by Hayek that legal pluralism and specifically anarchism are logical implications of Hayek's economics. The Hayekian anarchism we describe is pluralistic and not committed to a particular way of doing things. Recognizing this allows one to see that law can be provided in a multitude of ways, not just the one-dimensional perspectives offered by economists who attempt to boil down development to whether a country has common law versus civil law (Glaeser and Shleifer, 2002; La Porta, Lopez-de-Silanes, Shleifer, and Vishney, 1998).[5] Just as different people prefer different goods or lifestyles in general, various types of societies and laws could be chosen and could be in accordance with a pluralistic anarchist legal framework.

Our article proceeds as follows. Section 2 develops Hayek's ideas about the nature of economics and law as a "discovery process" and a response to the knowledge problem in economics. Section 3 discusses Hayek's attempted resolution of the knowledge problem in law through his intellectual migration over time toward his enthusiasm for the common law system, and especially the English common law, which provided his most developed explanation of the nature of

[4] We recognize that Hayek said a lot of—often contradictory—things, so we do not want to hold him up on a pedestal or claim that we have the true interpretation of Hayek. Describing his legal theory, Hasnas (2005, p.79) writes that "Hayek paints a portrait of the law of liberty that is simultaneously brilliant and inspiring, and utterly confused." For a discussion of how Hayek's ideas differed over time, see Caldwell (1988, 1997, 2004), Boettke (1990, 2005), and Beaulier, Boettke, and Coyne (2005).

[5] Although the common law versus civil law legal origins literature produces neat and tidy models and data, it grossly oversimplifies the economy, law, and all economic history. For example, the idea that Netherlands has a French legal system and fewer shareholder protections, so therefore should have a smaller capital, completely market ignores the fact that the world's first major stock market originated there more than four centuries ago. A legal origins theorist could look to see whether that development was associated with the "The French Commercial Code," which "was written under Napoleon in 1807, and brought by his armies to Belgium, the Netherlands, part of Poland, Italy, and Western regions of Germany" (La Porta et al, 1998), but they would be neglecting 200 years. Instead, a much more fruitful approach would be to look at all of the specific details about what was happening in the Netherlands at that time (for example, breaking away from Spain and becoming a much more tolerant and commercial society), and in fact one can observe rules and order associated with the stock market emerging independently of the state (Stringham, 2003). Many of the Dutch practices were soon adopted in London, and these too evolved independently of the state in their own unique way (Stringham, 2002). We posit that the key to analyzing all of this is to consider the fact that rules and order come from many sources and in many forms, thus the importance of what Boettke (2005) refers to as analytical anarchism.

law. Section 4 discusses the knowledge problems associated with centrally provided law, including how government law enforcement lacks a proper feedback mechanism to see if what they are providing is in accordance with what people want. Section 5 discusses some of the accountability problems of centrally provided law, including how very little prevents monopolized courts from veering away from their role of adjudicating disputes based on legal norms "discovered" in the expectations of parties and society. Section 6 concludes that, although he wasn't, Hayek should have been an anarchist.

2. The use of knowledge in markets and law

a. Hayek's theory of markets

Hayek's theory of market competition as a discovery process has been discussed in depth by many authors, but it is useful to briefly review it in order to frame an understanding of his theory of law. Hayek believed that decentralized markets and the price system help transmit important knowledge throughout the economy.[6] The world is constantly changing, but market prices provide continually updated information and incentives to help people to coordinate over time.[7] Prices help producers see how much consumers value the cost of inputs and how they value the end products. Profits and losses provide constant feedback to help producers see if they are providing goods that consumers value. Prices also act as signals to other producers to encourage people to get into or out of a particular market. This coordination process works over a very large scale and in very complex

[6] Hayek (1948, p.54) described what he considered, "The central question of all social sciences: How can the combination of fragments of knowledge existing in different minds bring about results which, if they were to be brought about deliberately, would require a knowledge on the part of the directing mind which no single person can possess?" For a discussion of the idea that that many other important, perhaps much more important, questions in social science exist, see Salerno (1993).

[7] In Hayek's (1948, p.83) words, "The continuous flow of goods and services is maintained by constant deliberate adjustments, by new dispositions made every day in the light of circumstances not known the day before, by B stepping in at once when A fails to deliver."

societies, as anonymous producers produce products that meet the needs of anonymous consumers on the other side of the globe.

Of particular interest here is that Hayek considered competition to be a "discovery process" (Hayek 1968/2002). By this he meant that competition is important because we often don't know what should be produced until a market test occurs. More generally, Hayek (1967, p.179) observes that where competition is justified "it is on the ground that we do *not* know in advance the facts that determine the actions of competitors. In sports or in examinations, no less than in the award of government contracts or for prizes for poetry, it would clearly be pointless to arrange for competition if we were certain beforehand who would do best." As applied to market competition, the value of competition as a discovery process is that at any given time producers do not know what consumers want; the trial-and-error experimental process of market competition, error, and feedback provides producers with information and feedback as to what consumers want or do not want. Through this iterative process of positive and negative experimentation, the market sends signals not about "what people *have* done, but only with what they *ought* to do." He noted that "Competition operates as a discovery procedure not only by giving anyone who has the opportunity to exploit special circumstances the possibility to do so profitably, but also by conveying to the other parties the information that there is some such opportunity. It is by this conveying of information in coded form that the competitive efforts of the market game secure the utilization of widely dispersed knowledge" (Hayek 1976b, p.116-7). Competition, Hayek (1968/2002, p.10) noted, is "a procedure for discovering facts which, if the procedure did not exist, would remain unknown or at least would not be used."

Indeed, sometimes consumers themselves may not know what they want or that a product is even available, and the value of competition is to propose entrepreneurial innovations that consumers may not realize even existed previously. The desires of consumers are often inchoate

until confronted with a tangible choice or opportunity. Competition simultaneously reveals consumer preferences and provides signals to transfer productive resources toward the production of some products rather than others.

Thus, although the entrepreneur forecasts that his supply will fulfill consumer wants, he cannot be sure until the competitive process has been played out. A system that lacks competition lacks this feedback mechanism. Because no one organization could gather the necessary information to coordinate behavior among millions of individuals, a system of central planning is without a rudder. Markets, on the other hand, help people determine what among the multiple possible uses of a given resource will meet human wants. Through the informal and impersonal workings of the price system, knowledge possessed by one person can be transferred to the rest of society.

Hayek thus treats the competitive process as an iterative process of constantly discovering "facts" about the economic world—extant but unarticulated consumer needs and preferences that must be translated into productive output. Indeed, Hayek expressly analogizes the process of market discovery of facts to the process of scientific discovery, as many different scientists simultaneously working independently but building on one another's findings seek an increasingly accurate understanding of the natural world. Scientific discovery, then, is also a discovery process, as scientists proffer hypotheses and then test those hypotheses through Popperian experimentation, and the web of interlocking scientists simultaneously seeking truth through experimentation combines to a spontaneous order.

b. Hayek's theory of law

Hayek portrayed the economy as a spontaneous order that emerges without central design. Hayek also came to apply his thinking about spontaneous order to other institutions including law. For much of his life Hayek viewed the ideal of law through the lens of the continental *Rechsstaat* tradition, a model largely derived from the civil law system that prevailed on the continent beginning

with Napoleon. This is the model of law that is implicit in Hayek's analysis of the rule of law in *The Road to Serfdom* (1944) and *The Constitution of Liberty* (1960). The *Rechsstaat* is largely statute-based law, and Hayek's enthusiasm for this model of law seems derived from his notion that the ideal of the rule of law is predicated on formal legal rules clearly expressed, prospectively promulgated, and equally applied.

But in his three-volume work *Law, Legislation, and Liberty* (Hayek, 1973, 1976, 1979), Hayek's understanding of law shifted radically. Instead of the *Rechsstaat* tradition that dominated his early work, Hayek shifted his focus to the common law of England rather than the civil law system of Europe. Although Hayek explained his shift as being a transition from an earlier focus on "public" law to a new focus on "private" law, a careful reading of *Law, Legislation, and Liberty* makes clear that he had made a more general jurisprudential shift toward a new understanding of law itself and the ideal of law. In particular, Hayek came to believe that the bottom-up lawmaking process of the common law was more conducive to liberty, coordination of individual expectations, and efficient use of dispersed knowledge than the top-down legislature-focused approach of those earlier works. In large part this preference arose from Hayek's understanding of the common law as being analogous to a market process. Hayek argued that judges deciding concrete disputes based on their detailed, albeit often intuitive tacit and local knowledge, yielded a better institutional foundation than legislators trying to anticipate all future circumstances prospectively according to detailed rules. But Hayek also argued that although each case was a judicial resolution of particular disputes in concrete factual contexts, the common law itself was abstract in nature, as coherent, abstract principles emerged from the aggregation of many decentralized judicial decisions. But these abstract articulated principles are emergent from many particular judicial decisions, not their genesis. Hayek (1973, p.86) believed that "The chief concern of a common law judge must be the expectations which parties in a transaction would have reasonably formed on the basis of the general practices that the ongoing

order rests on." He thought that "in an ever changing society" judges must seek to find rules that will "aim at securing certain abstract characteristics of the overall order of our society that we would like it to possess to a higher degree" (Hayek, 1973, p.105). Hayek claimed that the law must gradually evolve depending on what will help keep people's expectations relatively stable.

Underlying this approach was Hayek's (1973, p. 162) conviction, following Hume (1740, Book III, p.541), that the essence of law is not created by the state, but rather preexists in the conventions and understandings of the individuals that compose a given community. Although this underlying consensus is largely conventional, in that it emerges spontaneously from the decentralized interactions of many people living together in a society, it is far from arbitrary.[8] In fact, again following Hume, Hayek notes that every peaceful and functioning society must have at its core a system of rules dealing with the ownership, transference, and protection of property from others—what is conventionally referred to as property, contract, and tort law. That such a system of rules is implied follows because societies that lacked such a system would be unable to prevent conflict over resources and reward investment, resulting in the group's elimination in a Darwinian-style competition among different groups defined by different systems of rules (Zywicki, 2000). Hayek wrote:

> The basic source of social order, however, is not a deliberate decision to adopt certain common rules, but the existence among the people of certain opinions of what is right and wrong.... Except where the political unit is created by conquest, people submit to authority not to enable it to do what it likes, but because they trust somebody to act in conformity with certain common conceptions of what is just. There is not first a society which then gives itself rules, but it is common rules which weld dispersed bands into a society. (1979, p.33)[9]

[8] Hayek (1976, p.42) wrote, "In such an effort towards the development of a body of rules, most of which are accepted by the members of society, there will therefore also exist an 'objective' (in the sense of being inter-personally valid, but not of universal—because it will be valid only for those other members of the society who accept most of its other rules) test of what is unjust."

[9] Given this preexisting consensus as to the basic principles of a community, Hayek (1973, p.95) noted, "It is only as a result of individuals observing certain common rules that a group of men can live together in those orderly relations which we call a society. It would therefore probably be nearer the truth if we inverted the plausible and widely held idea that law derives from authority and rather thought of all authority as deriving from law—not in the sense that the law appoints authority, but in the sense that authority commands obedience because (and so long as) it enforces a law presumed to exist independently of it and residing on a diffused opinion of what is right."

The role of the judge, Hayek argued, is not to "make" the law, such as by articulating the "best" rule according to some external standard of value, but to "discover" the law in this imminent consensus of norms and expectations that underlie a given community (Zywicki and Sanders, 2008). To Hayek (1973, p.118), this judge-made law is part of the spontaneous order.[10]

Hayek (1973, p.72) argued that law "has never been 'invented' nor can it be 'promulgated' or 'announced' before hand" (1973, p118). He went onto the write that rules that emerge from the judicial process:

> [A]re *discovered* either in the sense that they merely articulate already observed practices or in the sense that they are found to be required complements to the already established rules if the order which rests on them is to operate smoothly and efficiently. They would never have been discovered if the existence of a spontaneous order of actions had not set the judges their particular task, and they are therefore rightly considered as something existing independently of a particular human will; while the rules of organization aiming at particular results will be free inventions of the designing mind of the organizer. (Hayek, 1973, p.123)

Thus, the role of the judge is to *discover* the law and apply it to a particular concrete dispute, not to create or impose the law. Hayek describes a judge articulating or discovering preexisting rules in society in much the same way that he describes market participants discovering knowledge about the economy. Hayek conceives of a judge as being in a position similar to, for example, an owner of a gasoline station who when posting prices does not concoct the price of gasoline, but merely discovers what the market will bear based on the interactions of billions of people, including himself, and then articulates what he has found (Zywicki and Sanders, 2008). Consider the analogy further. Viewed in isolation, it may appear that when the gas station owner posts the price for a gallon of gas, he is "making" or "creating" the price of gas. But in reality, of course, neither the gas station owner nor any other person creates the price of gas. Instead, the price of gas at a particular

[10] Hayek (1973, p.123) wrote, "The difference between the rules of just conduct which emerge from the judicial process, the nomos or law of liberty— and the rules laid down by authority...lies in the fact that the former are derived from the conditions of a spontaneous order which man has not made, while the latter serve the deliberate building of an organization serving specific purposes."

gas station at a given time reflects the decentralized interactions of billions of people around the world. The price posted at a particular gas station is therefore properly understood as merely an articulation or announcement of the outcome of all of these interactions by the gas station owner, not a "creation" or "making" of the price of gasoline, even though to the naïve eye it may appear that the gas station is doing exactly that.

Hayek suggests that the role of a particular judge in the common law system is analogous to that of the gas station owner in the market system. Although it appears that a judge "makes" the law, Hayek argued that in reality the common law judge is simply doing what the gas station owner does: articulating or announcing the outcomes of an underlying spontaneous order process, not actually "making" the law. This is the notion in which Hayek argued that judges "discover" the law rather than making it.[11] Hayek wrote:

> While the process of articulation of pre-existing rules will thus often lead to alterations in the body of such rules, this will have little effect on the belief that those formulating the rules do no more, and have no power to do more, than to find and express already existing rules, a task in which fallible humans will often go wrong, but in the performance of which they have no free choice. The task will be regarded as one of discovering something which exists, not as one of creating something new, even though the result of such efforts may be the creation of something that has not existed before. (1973, p.78)

Note that Hayek here asserts two key propositions about the role of the judge: first that he can "do no more," and second that he has "no power to do more" than to find and express already existing rule. Finally, Hayek acknowledges that judges "often will go wrong" in their efforts to discover and articulate the law. As we will see in Part 3 below, each of these elements in Hayek's argument have important implications for the arrangement of legal institutions.

Hayek's use of the term "discover" to describe the task of the judge in the common law system is almost certainly deliberate in the sense that it is meant to invoke Hayek's notion of competition as a discovery process articulated in his economic theory. Still further, Hayek's

[11] We take no position here on whether this characterization of the common law as a process of "discovering" law rather than "making" law is actually accurate. Here we are simply describing his view without assessing its descriptive validity.

description of the iterative process of legal discovery by judges, of trial-and-error efforts to better articulate the underlying norms and expectations of justice of those in a given society, strongly resembles the market discovery process that he has previously described. Furthermore, this sense of the law is oftentimes tacit (Zywicki, 1998); it exists in customs and conventions that evolve over time, in Hayek's framework an intuitive knowledge of what the rules are even if it is difficult to state or define the rules precisely. Equally illuminating is Hayek's (1973, p.120) suggestion that the judicial task of articulation of law is comparable to the hypothesis-testing of the scientific process, which Hayek described as a discovery process as well.

Discovery of legal rules takes place on several different levels. We do not know what principles a society should adopt to realize the end of overcoming the knowledge problem. From this perspective, the principles that guide a society will not be known ahead of time. Rather, Hayek claims that they spontaneously emerge from the ongoing interactions of individuals. Some general truths or laws may exist, but those that best encourage cooperation must be mixed with local elements such as culture, religious beliefs, climate, or land as well (Rosser and Rosser, 2008). No one can be certain beforehand of the exact institutions that will allow each specific society and each individual within the society to make the best use of his knowledge of his local situation. As Hayek stated:

> The rules under which the citizens act constitute an adaptation of the whole of society to its environment and to the general characteristics of its members.... The rules may have come to exist merely because, in a certain type of situation, friction is likely to arise among individuals about what each is entitled to do, which can be prevented only if there is a rule to tell each what his rights are. (Hayek, 1960, p.157)

Because this law is a convention created to meet the needs of the individuals in a society, it will never be completely static. Rather, it will change as human needs change, and the application of the general principles to specific cases will also change over time. In general, however, the overall principles will remain relatively constant. These general laws that develop are basically

unarticulated beliefs that will differ in minor ways from society to society, depending on the local circumstances in which a society finds itself. The law of a society is given its content by the individuals that comprise this society. These rules, however, are not arbitrary; they are general ideas that emerge to resolve conflict and promote coordination. As society becomes larger, more complex, and more heterogeneous, it becomes necessary to verbalize and articulate these intuitively understood rules. But, as Hayek stresses, the verbal formulations are not "the law"; it is the underlying tacit consensus on principles and expectations that is properly the law.

c. Why Hayek was not an anarchist

In light of Hayek's theory of the nature of law, what type of legal institutional framework did Hayek believe was best suited to effectuate the discovery of law? One thing is clear: Hayek did not consider himself to be an anarchist. To Hayek, the discovery of local knowledge about law would take place among a system of somewhat decentralized *government* judges.[12] In a 1978 interview Hayek explained why he believed we need government rather than a system of competing law enforcers:

> I believe there is one convincing argument why you can't leave even the law to voluntary evolution: the great society depends on your being able to expect that any stranger you encounter in a given territory will obey the same system of rules of law. Otherwise you would be confined to people whom you know. And the conception of some of our modern anarchists that you can have one club which agrees on one law, another club [agrees on another law], would make it just impossible to deal with any stranger. So in a sense you have, at least for a given territory, a uniform law, and that can only exist if it's enforced by government.

Hayek argued that there must be a common framework of rules for the great society to exist, from which he infers that there must be a state to provide those rules.[13] Hayek's ideal is a limited government that will allow for the flourishing of spontaneous order in all realms of life: economic, social, legal, and otherwise. In *Law, Legislation, and Liberty* Hayek outlines his ideal legal order that

[12] And, ultimately, these government judges work within a greater legislative framework.
[13] It is not obvious why, for example, it is necessary to have a common legal system but not a common monetary system—which, as noted, Hayek argued was unnecessary.

allows for the discovery, articulation, and use of the conventions that individuals recognize as justice. He argued the law should be predictable yet flexible and open to change and improvement.

For Hayek, the main basis of the legal system is common law or what he calls judge-made law. The common law is a concept most closely identified with the Anglo-American tradition of law, featuring an adversarial procedure of real cases between two conflicting parties in which legal rule making usually derives in the first place from judges, subject to overruling by legislatures (Stringham and Zywicki, 2010).[14] Rather than deciding every case independently, however, the judges in a common law system use a body of precedents built up over the ages to draw analogies to the particular case at hand. Hayek emphasized, however, that it is not the precedents themselves that are law, but the principles that underlie them. The written precedents are merely verbal formulations, and holdings were examples that provided evidence of the underlying principles that are the true source of law; the case decisions themselves are not the law and do not make the law (Zywicki 2003, pp. 1566-1569). In that description of the nature of law, Hayek profoundly breaks with the ideology of legal positivism in favor of the historical school of jurisprudence associated with Savigny, C.K. Allen, and others. In contrast to more civil law–based systems, Hayek believed that the common law is much better suited at discovering the law; indeed, he implies that legislative-based systems in practice generally are not "law finding" systems at all, but rather law-making institutions engaged in deliberate, constructivist creation of law for designated social ends (although in theory they could operate at least to some extent like the common law). He also believes that the common law helps utilize knowledge because in deciding the implications for a certain ruling, judges can use the body

[14] Note that the adversary process itself is a system of competitive evidence provision, in contrast to the inquisitorial system in which the judge essentially is a central planner for purposes of evidence gathering. The adversary system, it turns out, is justified primarily where competition is necessary to discover hidden or private knowledge that would be unlikely to be discovered but for that competition (Zywicki 2008). The analogy to the value of competition in market discovery is obvious.

of precedent that has been built up. The common law thus allows judges to draw on the wisdom of their predecessors.

To Hayek the common law is a crucial element of spontaneous order in society. He also praises the common law because it provides a high degree of predictability, one of the major goals of the rule of law. Indeed, although legislation superficially appears more predictable and certain than common law because of the greater verbal precision of legislative pronouncements, Hayek argues that in reality the common law provides greater predictability because its decisions derive from widely-shared notions of what is just, making it easier for most people to conform their behavior to the expectations of the law rather than having to seek technical legal advice to know whether a proposed action is permissible. By looking at how previous similar cases were decided and the principles that they illustrate, the litigants in a given controversy can to a high degree predict how a given case would be decided, and can therefore factor this decision into their individual planning.[15]

But Hayek did not believe that the law should remain fixed. He believed that changes in law over time are often beneficial, although Hayek's approach to progress may be seen as evolutionary rather than revolutionary.[16] Progress occurs through a process of a selective evolution of traditions, much like biological evolution. Hayek sees this as a gradual process of selecting a particular set of rules or laws, at particular times, and for particular reasons. Although changes send ripples into potentially all facets of life, these changes should be ripples that people can gradually adapt to, not tidal waves. Hayek describes how new rules should emerge as the result of a piecemeal process of evolution:

[15] By emphasizing reliance on precedent, Hayek also hopes to control potentially mischievous judges by preventing them from reading their own ideological interpretations into decisions.

[16] Hayek (1979, p.167) wrote, "We can endeavour to improve the system of rules by seeking to reconcile its internal conflicts or its conflicts with our emotions. But instinct or intuition do not entitle us to reject a particular demand of the prevailing moral code, and only a responsible effort to judge it as part of the system of other requirements may make it morally legitimate to infringe a particular rule."

> To become legitimized, the new rules have to obtain the approval of society at large- not by a formal vote, but by gradually spreading acceptance. And though we must constantly re-examine our rules and be prepared to question every single one of them, we can always do so only in terms of their consistency or compatibility with the rest of the system from the angle of their effectiveness in contributing to the formation of the same kind of overall order of actions which all the other rules serve. There is thus certainly room for improvement, but we cannot redesign but only further evolve what we do not fully comprehend. (Hayek, 1979, p.167)

Thus, just as laws originally emerge from the seemingly uncoordinated interactions of numerous individuals, change and improvement should also take place through the same process. If left on their own, individuals can make the adjustments necessary to reconcile new conflicts with the old body of laws that developed spontaneously.[17]

Hayek views governmental judge-made law as a proper scope of government and a crucial element of spontaneous order—whereas the content of the law can arise spontaneously, the institutional infrastructure of courts cannot be left to competition and spontaneous order processes. But Hayek also grants to the government another important power: he grants the legislature the ability to alter the law when common law reaches a "dead end" through adherence to precedent. Hayek delegates this responsibility to legislatures because in his scheme the role of the judge is to uphold expectations and engage in an imminent criticism of the law by making new rules and situations cohere within the existing infrastructure of rules. Thus, where a well-established rule is thought to be obsolete and reform is needed, it is inappropriate for judges to adopt a new rule that would disrupt settled expectations. Legislatures, however, can legislate prospectively and thereby essentially create new expectations, rather than making decisions based on settled expectations. Hayek emphasizes, however, that when legislatures engage in this sort of rule-making they should act in a fashion consistent with the abstract purpose-independent nature of common law rules

[17] Hayek believed that no one individual can comprehend the origin of the social world around them. Describing our moral rules, Hayek (1979, p.166-7) wrote, "We do not really understand how it maintains the order of actions on which the co-ordination of the activities of many millions depends. And since we owe the order of our society to a tradition of rules which we only imperfectly understand, all progress must be based on tradition. We must build on tradition and can only tinker with its products. It is only by recognizing the conflict between a given rule and the rest of our moral beliefs that we can justify our rejection of an established rule."

(*cosmos*) rather than the command-oriented nature of many legislative rules (*taxis*). He also supports legislation when the law develops in ways that are inconsistent with the market economy. Ultimately, Hayek believed in a system of law that builds on precedent and emerges and changes slowly over time, but when it reaches a dead end, he says the legislature is justified in intervening to remove the bad precedent and prospectively set the legal system onto a new and better track. To Hayek it is the best of all worlds: reliance on individuals who use accumulated knowledge and operate within a greater framework to ensure that the market persists. Individual judges could rely on precedent in law in much the same way that individual producers in markets rely on prices.

3. Why Hayek should have been an anarchist

Hayek thus describes the nature of the law and the relationship of judges to the legal process as one of "discovery," drawing an analogy to the similar process in markets. With respect to economics and science, Hayek argued that their nature as discovery processes implies the necessity of competition in institutional arrangements.

Yet Hayek shies away from reaching the obvious logical implication of his modeling of law as a discovery process: the need for competition in legal provision. In particular, as suggested above, Hayek treats as normative concepts what are fundamentally questions of positive analysis and institutional design: his admonition that judges "do no more" and "have no power to do more" than discover the law. But his institutional structure is inadequate to ensure that judges in fact do no more and that they lack the power to do more than discover the law. Each of these two statements of the problem suggest a different challenge for Hayek: the first raises the knowledge problem as to the institutional circumstances under which judges can actually discover the law accurately, and the second raises an accountability problem regarding the agency-cost relationship between judges and society as to whether judges can be constrained to discover the law rather than pursue their own interests.

a. The knowledge problem with centrally provided law

Although Hayek attempted to draw parallels between the market order and his ideal monopolized legal order, the crucial differences are that markets have competition and feedback through price, profits, and losses, whereas his or any other monopolized legal system does not. To understand why the judges in Hayek's ideal legal will be unable to discover the law, we should differentiate between two different types of competition: first, the one-on-one competition identified with the adversary system, but second, a broader type of competition between multiple providers of a service. Even though the adversaries are in one sense competing under a centrally provided system, there are no market feedback mechanisms to indicate whether the judges or the overall system is doing a good job. The usual market feedback mechanisms of competition are absent, yet Hayek does not identify how a monopolist legal system would overcome what can be considered knowledge problems.[18] At the outset even well-intentioned judges will have little idea if they are discovering the type of laws people support in society, just as a well-intentioned economic planning board will lack the knowledge to discover the appropriate prices of goods and services in the economy without competition and market feedback. Although judicial decisions will be subject to critique and analysis by other judges and scholars, that intellectual critique is only tangentially related to the real measure of judicial success—whether the judicial decision dovetails with existing societal expectations and whether the decision promotes social and economic coordination. The real test of the usefulness of a legal rule is found in the *unseen* effects of the rule in terms of the number of accidents avoided or conflicts averted, not the *seen* effects of the cases that come before the judge. On this question the judge will have almost no relevant knowledge or, crucially, a way of possibly acquiring the relevant knowledge to make that assessment (Zywicki and Stringham, 2010). Without

[18] Rowley (1989) wrote that Hayek has not "presented a convincing explanation as to why, or through what mechanism, the judiciary should be supportive of the law of liberty or the law of efficiency in a largely monopolistic court bureaucracy such as that which characterizes twentieth century Britain and the U.S."

any measurement of market demand, judges will be unable to determine whether their decisions are really right or wrong as measured by whether they actually do reflect parties' expectations and social consensus. Judges will also be vulnerable to mistakes in articulating the unarticulated law. Hayek recognizes that this process of articulation may oftentimes be inaccurate and supports minimizing it. But with a monopoly and no feedback mechanism, how will the judges know initially or as consumer demands change whether a particular decision or verbal articulation is consistent with underlying expectations? Hayek's nomos or law of liberty are ever-changing, so even if a monopolistic legal system could discern the content of the law, the specifics would be useful for only a short period of time.

If such a system is combined with a strict adherence to precedent, *stare decisis*, then errors can create path-dependency effects that build upon each other and spread to other areas of the legal framework (Zywicki and Stringham 2010). Although knowledge of the past, as embodied in the process of precedent, may be superior to no body of knowledge at all, it seems inferior to knowledge of the past as well as the present. If, on the other hand, the common law allows judges to overrule precedent, it does not indicate when or what the new decision should be. Whatever the court decides will be enforced, so how the "right" or "wrong" decision could even be compared is not clear. Lacking a feedback mechanism, the judge is on his own. Furthermore, the stakes are extremely high, because if the judge chooses incorrectly, he could set off a chain reaction of unintended consequences. One has to ask, at what point do we determine that a precedent is wrong? Should a judge with a different opinion overrule the initial precedent as incorrect? Or the second interpretation of it? Or the third, or the tenth? A view of law wedded to precedent must start with the assumption that all previous precedents are correct. After this, without a feedback mechanism, judges are effectively without guidance in trying to decide which precedents are no longer relevant

or which to overrule. But giving judges such discretion would defeat the purpose of Hayek's legal order: to discover and implement what society recognizes as law.

These problems are not solved by pushing the decision into the hands of the legislature. The same knowledge problems that pose difficulties in judges' attempts to discover the law are also present when the legislature attempts to intervene. Because legislators are confounded by the knowledge problem just as everyone else is, they will have difficulty determining how the rest of the human expectations, conventions, and other interlocking institutions will respond to changes in the legal structure. Pushing the problem back to the voting public will not solve the problem either. With little way to evaluate the goodness of any given rule or the performance of any individual judge, the public will be left wondering if the judge's opinion or the legislature's laws are simply personal opinions shrouded in false cloak of justice. Without profits and losses providing a feedback mechanism, judges and legislatures have little way of determining Hayek's nomos or law of liberty.

b. Accountability problems with centrally provided law

In addition to knowledge problems, centralized law enforcement suffers from accountability problems. Hayek's formulation creates an agency cost relationship with judges: he says how judges *should* act—articulate parties' expectations—but institutional arrangements determine whether they *will* act in that manner. The knowledge problem deals with the well-intentioned judge; the accountability problem deals with the judge who doesn't want to be constrained.

Judges can attempt to discover Hayek's preferred law of liberty, or they can pursue other agendas. As Judge Posner and others correctly point out, government judges maximize their utility just like everyone else, which can include increasing fame, leisure, money, specific political outcomes, or state power (Rowley, 1987; Posner 1994; Stephenson, 2009). No matter how strictly a set of laws are drafted, or adherence to judicial precedence may be commanded, any rule of law will still have to be implemented, interpreted, and executed by human beings (Hasnas, 1995). Absent

competition, there are no obvious constraints on judicial agency costs for judges to pursue their personal preferences rather than seeking to "discover" the law as Hayek says that they should. Absent competition, there are no incentives for judges to even *seek* to supply Hayek's law of liberty as opposed to pursuing their ideological predilections or simply shirking and consuming leisure. Difficulties magnify when power-seeking individuals are attracted to government, as Hayek (1944) suggests in his theory of why the worst get on top. No matter how stringent the selection process of these individuals is, a large amount of room exists for them to err and exploit their power.

Why is monitoring government judges or other lawmakers difficult? Hayek argued that no one party can understand the wisdom of the law, which implies that evaluating whether a judge is acting prudently or venally is inherently difficult. A citizen or watchdog group may know their own position on a specific law, but they cannot know the exact feelings of others. They are therefore in the same position as judges who lack a measure about how a particular case "should" be decided. Judges or lawmakers wanting to use the law to advance a particular agenda can very easily come up with justifications of their actions that sound interested in public betterment (hence the existence of law reviews). These problems are not solved by the fact that adversaries compete and make their case about what is right in any given dispute. Although this system does provide a type of competition, the judges are the ones who ultimately call the shots, which leaves them room to pursue their own agenda. With a system of judicial review, the problem is simply pushed to a higher level, which gives even more power to the appellate or supreme courts.

Hayek's proposed solution of granting to the legislature the power to control judges and improve the law merely shifts the problem one level higher. The problem now becomes one of controlling the actions of the legislature instead of the judges.[19] But in making this logical move, Hayek betrays his own insights about the nature of law as a spontaneous order: in a world of

[19] In fact, Hayek saw the gradual usurpation of power by the legislature from the courts as the most troublesome development of the era in which he wrote.

legislative supremacy, law at root rests on top-down positivism rather than bottom-up polycentrism. Hayek's theory rests on a radical decentralization and polycentrism of law in which courts are engaged in an ongoing, dynamic discovery process of experimentation, trial-and-error, and feedback. In fact, Hayek's vision of law seemingly pushes toward the less-hierarchical polycentric institutional structure of his friend Bruno Leoni (1972, pp. 23-4), who argued that a "Supreme Court" with authority to issue top-down binding pronouncements on lower courts was actually an anomaly in a true common law system. Leoni also argued that it would be possible to rely on entirely judge-made law rooted in custom and dispense with legislation completely—an argument that Hayek (1973, p. 68, n. 35) rejects with minimal explanation. If the legislature has the trump card and can intervene whenever they do not like a judicial decision, the incentives for the politicization of law are quite clear. In Hayek's system the express purpose of the legislature is to overturn precedents and start in new uncharted directions, which seems to go against his other goals of having stability and the rule of law rather than men. For Hayek's system to work, the rest of the problems of politics that Hayek and other public choice scholars identify would have to not exist.

c. Competition in law as the solution

Hayek thus argued that the goal of the judge should be to "discover" the law. But, we argue, the institutional structure that he has devised is inadequate to actually ensuring that result. What is the solution? By applying Hayek's insights about the knowledge problem in the economy to the workings of the legal system, we are led to a logical, albeit seemingly radical, institutional conclusion: law, like other goods and services, must be provided in a competitive marketplace. We must have competition among different suppliers of law, and consumers must be allowed to choose among those suppliers.

Moving beyond the "central provision or no provision" mindset enables one to realize that law can be provided in a plethora of ways. Whether the competition takes place alongside

government law, as with modern arbitration, mediation, and other forms of alternative dispute resolution (Benson, 1998; Caplan and Stringham, 2008), or whether the competition is completely free of government (Friedman, 1979; Benson, 1990; Anderson and Hill, 2004; Curott and Stringham, 2010), we can see private legal bodies providing different rules and procedures dependent on time and place. A centralized system of law is one-size-fits-all (Hasnas, 1995; Stringham, 1999), and everyone receives rules and procedures whether they like them or not. But in a system in which people are allowed to select from many competing providers of law, they can have the set of rules and enforcement procedures that they actually value.

As quoted above (in Section 2.c), Hayek worried that in a society without a monopoly over law, people would encounter others who do not follow the exact same rules. In an important sense he is correct that if law were left to voluntary evolution, different clubs would have different rules. But what he does not realize is that this already happens all over the world today. Not only do people cross international boundaries that have differences in laws, laws differ between states and between towns. For example, rules about everything from carrying firearms to drinking alcohol on public property vary across the United States, but ask most Europeans, and they will be surprised that carrying firearms is legal anywhere or that drinking on public property is illegal anywhere. Yet Europeans travel to the United States all of the time without major problems. The whole basis of international trade, which has been taking place for hundreds if not thousands of years, is that it can take place between people of very different backgrounds (Leeson, 2006). Obviously Hayek is wrong to state that having different rules in different regions "would make it just impossible to deal with any stranger." Moving beyond the political sphere, in any given territory rules of conduct also vary greatly within different private establishments. English tearooms have very different rules than motorcycle bars, and soccer fields have very different rules than boxing rings. What is encouraged inside a boxing ring is criminal behavior outside it. Most people we know think twice before

entering a motorcycle bar or a boxing ring. But even though house rules at bars can differ, most establishments choose to have fairly similar rules. This is not a problem with voluntarily evolved rules, but an advantage.

Pluralistic anarchy allows rules to vary or change over time depending on the preferences of club members.[20] For example, the private rules in rugby differ from those in football, and the same is true between a strict or less strict college. As preferences evolve, people might decide they now like football over rugby or a less strict college to a strict one, and private providers of rules can adapt accordingly. By contrast, under a monopoly system, the decisions of a court will be enforced regardless of what people want. Private providers of rules that respond to the type of law demanded by society will profit, and those that do not will incur losses. The profit and loss system will thus signal that a certain kind of law is demanded at any given point in time.

To illustrate the benefits of competition in the law, let us take a parallel from regular market competition that Hayek would certainly praise, the question of how many and what types of shirts should be produced (including what size, fabric, color, and style). A system based on legislation, even democratically based, would basically need to guess on all counts. A legislator could guess whether his constituents wanted more shirts or fewer than provided the last time he or his

[20] The system we are describing overlaps with the ideals described Rothbard (1973), Friedman (1973), or Hasnas (1995) with some minor differences. In Rothbard, adherence to the non-aggression principle (or, to use Leonard Read's phrase, anything that's peaceful) is key, and we agree, but we focus on how once people opt into a particular club the particulars have a lot of room to vary and evolve based on custom over time. We believe that a lot of the specifics of the legal rules, such as rules of evidence or punishments for crimes, that Rothbard (1973, p.227) thought had to be laid down with "precise guidelines for private courts" could, as a practical matter, be decided differently by different clubs.

Friedman, talks about rules varying across legal providers, including on issues such as whether or not drugs should be allowed. In Hasnas, any rule or procedure is okay as long as it is the product of market evolution. Hummel (1973), however, points out that despite what Friedman may imply, Friedman's system necessarily cannot be an anything goes system, as it requires a bright line rule that competing law enforcement agencies are not allowed to collect taxes; otherwise, the system differs little from government. From there it's a question of where one draws the bright line of what is acceptable and what is not (what constitutes a violation of the non-aggression principle and what does not). In the same vein, to support market evolution (as opposed to coercive government changes in law), Hasnas has to have a bright line definition of what constitutes market evolution and what constitutes violations of it. Doing this ultimately requires having some definition of what counts as markets (voluntary) and what counts as violations of it (aggression), similar to that of Rothbard. To use phraseology similar to Den Uyl and Rasmussen (2005), once one agrees on the meta-rule or meta-norm of respecting basic rights, the particular norm or rule systems that people opt into can vary quite a bit.

predecessor was elected, but they would have little idea about how shirts related to the real ranking of what each citizen prefers. A shirt provision system based on Hayek's view of the common law might come closer to fulfilling individual wants, as it would use historical precedent to decide the types of shirts that will be manufactured now. But it's unclear how government would innovate or respond to changing consumer wants. As the shirt example illustrates, there is no optimal number of uniform shirts or even an optimal combination of different types of shirts. What is best varies from place to place and over time depending on what people want.

Similarly, with laws and legal procedures, what people want will vary from place to place and over time. Rosser and Rosser (2008) describe how many societies are becoming economically developed while keeping many of their traditional elements. For example, in other societies parties choose to take their disputes to a wise person in the village (Benson, 1988; Stringham and Miles, 2010). It seems that people in different societies (or even within societies) might prefer different dispute resolution methods than the monolithic adversarial system that Hayek recommends.

In fact, of particular interest here is that the legal system that Hayek holds up as the model for his ideal of law was the English common law system. But that system itself was characterized by multiple providers of legal services competing side-by-side for centuries, including multiple common law courts, church courts, the law merchant, and other private courts such as the Courts of the Staple (Helmholz, 2004; Stringham and Zywicki, 2010). This competition among rival providers of legal services ensured that judges, who were paid in part according to the number of cases they heard, would seek to discover the law in the expectations of the private parties to the dispute rather than pursing their own self-interests and that the judges would provide speedy and fair justice.[21] Parties who were able to vote with their feet could simply refuse to patronize those judges and legal

[21] We discuss the conditions under which this competition can yield a beneficent spontaneous order in Stringham and Zywicki (2010). *See also* DiIanni (2010). Klerman (2007) has challenged some elements of the traditional story. We respond to those arguments in Stringham and Zywicki (2010).

systems that sought to use law to promote their own goals rather than to further the needs of the parties. As Adam Smith ([1776] 1976, p. 423) wrote, "During the improvement of the law of England there arose rivalships among the several courts," and Smith praised the competition, saying that "each court endeavoured, by superior dispatch and impartiality, to draw to itself as many causes as it could» (Smith [1776] 1976, p. 241). Thus not only is competition in the provision of legal services an implication of Hayek's theory of law, Hayek's theory of law itself arose in exactly that institutional context.

What is the optimal way to resolve disputes? We need not and cannot possibly resolve that question here. Nor will we here try to address the huge question of whether anarchy is possible or efficient. Our purpose here is more modest—to note that if Hayek is correct that law-making is a discovery process similar to the discovery process of economics, it follows that the optimal system for provision of legal services should be predicated on a competition-based, rather than a monopoly-based, system. The need for judges to receive both positive and negative feedback in the provision of dispute resolution services is relevant in the provision of legal services as it is in anything else. Whether that ideal holds in a second-best world is a question for another day. We note, however, that throughout history numerous examples of stable, stateless orders have existed and in certain areas continue to exist (Benson, 1990; Friedman, 1979; Stringham, 2005; Leeson, 2006, 2007a,b,c, 2008; Powell, Ford, and Nowrasteh, 2008; Adolphson and Ramseyer, 2009). Analyzing theses stateless orders, one can find many similarities between systems, but one also notices the particulars varying between time and place. Even if it is thought that second-best considerations render the ideal unworkable in practice, Hayek's understanding of the relationship between competition in economics and law can help inform the design of legal institutions in order to harness the power of competition. Zywicki (2006), for example, notes that the understanding of competition as a

discovery procedure can provide a model for understanding the efficient conditions for competitive federalism and its limitations.

4. Conclusion

Just as competition enables discovery and innovation in markets, competition enables discovery and innovation in law too. If one takes Hayek's discussion of the importance of discovery through competition seriously, one should question the idea that the state must provide law centrally. Centralized law enforcement faces knowledge and accountability problems similar to those of central economic planners. Hayek's proposed institutional system for the provision of law simply was not radical enough to capture the benefits of a decentralized competitive order. Rosser (2010) makes the case that although Hayek's economics was oriented toward a complexity approach, in many ways he did not go far enough. We reach a parallel conclusion about Hayek's legal theory. Even though Hayek thought that government judge–made law could help encourage spontaneous order, such judges lack feedback mechanisms, so whether they are doing a good or a bad job will always be unclear. Hayek praises relying on precedent as a way of basing decisions on accumulated wisdom, although he supports allowing the law to change. Yet centrally provided systems have no way to measure the unseen or indirect consequences of relying on precedent versus changing the law. Monitoring judges becomes difficult, and the door becomes wide open for self-seeking individuals to attain their own ends in the name of improving the law, the common good, or any of the other of the myriad of euphemisms justifying state action.

Instead of relying on centrally provided law, we have suggested a Hayekian anarchism that does not rely on a monopoly of law. This anarchism is pluralistic in that it allows the law to vary from place to place and over time. Although Hayek overlooked them, one can find numerous examples throughout history of stateless orders that solve problems in various decentralized ways. An entire research program of what can be considered Hayekian anarchism seeks to document and

describe the mechanisms of how such systems work (Boettke, 2005). Skeptics might reasonably wonder how stable such solutions would be over time or whether they could work today. A large literature debating or researching the implications of these questions exists (Stringham, 2007; Powell and Wilson, 2008), but at a minimum we think Hayek's assumption about the necessity of having centrally provided law is overly simplistic.

Anthropologists such as Scott (2009) make the case that in the totality of human history, stateless has been the norm, so one should not assume that a monopoly over law is the only way of organizing society. Given Hayek's internal logic about the need for experimentation and openness, we think he should have been more open to thinking about having a competitive legal system or anarchism. At the very least, if Hayek is correct, this suggests that there should be room for greater experimentation and competition among competing legal systems, such as private systems (including arbitration), or enforcement of choice of law clauses in contracts that permit parties to choose among the laws of different jurisdictions. There is no reason to categorically rule out a whole host of ways society can be organized. Through competition, individuals can discover what types of institutions fit their needs best.

References

Adolphson, M, Ramseyer, J.M., 2009. The competitive enforcement of property rights in medieval Japan: The role of temples and monasteries. Journal of Economic Behavior and Organization 71, 660-668.

Anderson, T.L., Hill, P.J., 2004. The not so wild, wild west: Property rights on the frontier. Stanford: Stanford University Press.

Beaulier, S., Boettke, P.J., Coyne, C., 2005. Knowledge, economics and coordination: Understanding Hayek's legal theory. NYU Journal of Law and Liberty 1, 209-223.

Benson, B., 1988. Legal evolution in primitive societies. Journal of Institutional and Theoretical Economics 144, 772–788

Benson, B.L., 1990. The enterprise of law: Justice without the state. San Francisco, CA: Pacific Research Institute for Public Policy.

Benson, B.L., 1998. To serve and protect: Privatization and community in criminal justice. New York, NY: New York University Press.

Boettke, P.J. 1990 The theory of spontaneous order and cultural evolution in the social theory of F.A. Hayek. Cultural Dynamics 3, 61-83.

Boettke, P.J., 2005 On reading Hayek: Choice, consequences and The Road to Serfdom. European Journal of Political Economy 21, 1042-1053.

Boettke, P.J., 2005. Anarchism as a progressive research program in political economy. In E. P. Stringham (Ed.), Anarchy, state and public choice (pp. 206–220). Cheltenham, UK: Edward Elgar Publishing.
Buchanan, J.M., 1975. The limits of liberty: Between anarchy and Leviathan. Chicago: University of Chicago.
Bush, W., Mayer, L., 1974. Some implications of anarchy for the distribution of property. Journal of Economic Theory 8, 401–412.
Caldwell, B. 1988. Hayek's transformation. History of Political Economy 20, 513-41.
Caldwell, B., 1997. Hayek and socialism. Journal of Economic Literature 35, 1856-1890.
Caldwell, B., 2004. Hayek's Challenge: An Intellectual Biography of F. A. Hayek. Chicago: University of Chicago Press.
Caplan, B., Stringham, E.P., 2008. Privatizing the adjudication of disputes. Theoretical Inquiries in Law 9, 503-528.
Curott, N., Stringham, E.P., 2010. The rise of government law enforcement in England. In The Pursuit of Justice: Law and Economics of Legal Institutions, ed. Edward J. Lopez, Independent Institute.
Den Uyl, D., Rasmussen, D., 2005. Norms of Liberty: A Perfectionist Basis for Non-Perfectionist Politics. University Park, PA : Pennsylvania State University Press.
DiIanni, I., 2010. The Role of Competition in the Market for Adjudication. Supreme Court Economic Review 19, 203-231.
Epstein, R., 1999. Hayekian socialism. Maryland Law Review 58, 271-299.
Friedman, D., 1973/1989. The Machinery of Freedom: Guide to Radical Capitalism (2nd ed.). La Salle: Open Court.
Friedman, D., 1979. Private creation and enforcement of law: A historical case. Journal of Legal Studies 8, 399–415.
Glaeser, E.I., Shleifer, A., 2002. Legal origins. Quarterly Journal of Economics 107, 1193-1229.
Hasnas, J., 1995. The myth of the rule of law. Wisconsin Law Review, 199-233.
Hasnas, J., 2005. Hayek, the common law, and fluid drive, New York University Journal of Law and Liberty 1, 79-110.
Hirshleifer, J., 1995. Anarchy and its breakdown. Journal of Political Economy 103, 26–52.
Hayek, F.A., 1944. The Road to Serfdom. Chicago: The University of Chicago Press.
Hayek, F.A., 1948. Individualism and Economic Order. Chicago: University of Chicago Press.
Hayek, F.A., 1960. The Constitution of Liberty: Chicago: University of Chicago Press.
Hayek, F. A., 1967. Studies in Philosophy, Politics and Economics. Chicago: University of Chicago Press.
Hayek, F.A., 1968/2002. Competition as a discovery procedure. (Marcellus S. Snow Trans.) Quarterly Journal of Austrian Economics 5, 9-23.
Hayek, F.A., 1973. Law, Legislation and Liberty, Volume 1: Rules and Order. University of Chicago Press.
Hayek. F.A., 1976a/1990. The Denationalisation of Money, Third Edition, Institute of Economic Affairs, London.
Hayek, F.A., 1976b. Law, Legislation and Liberty , Volume 2: The Mirage of Social Justice. Chicago: University of Chicago Press.
Hayek, F.A., 1978. Tom Hazlett interviews Friedrich A. Hayek, November 12, 1978. UCLA Oral History Program and the Pacific Academy of Advanced Studies [accessed December 12, 2010 from www.hayek.ufm.edu].
Hayek, F.A., 1979. Law, Legislation and Liberty, Volume 3: The Political Order of a Free People. Chicago: University of Chicago Press.
Helmholz, R.H., 2004. The Canon law and ecclesiastical jurisdiction from 597 to the 1640s. Oxford: Oxford University Press.
Hume, D., 1740. A Treatise of Human Nature. Book III. London: John Noon.
Hummel, J.R., 1973. A comparison of libertarian primers. Libertarian Alternative 1, 3-5, 8.
Klerman, Daniel. 2007. Jurisdictional competition and the evolution of the common law. University of Chicago Law Review 74, 1179-1226.
La Porta, Lopez-de-Silanes, R., F., Shleifer, A., Vishny, R.W., 1998. Law and finance. Journal of Political Economy 106, 1113-55.

Leeson, P.T., 2006. Cooperation and conflict: Evidence on self-enforcing arrangements and heterogeneous groups. American Journal of Economics and Sociology 65, 891–907.
Leeson, P.T., 2007a. An-arrgh-chy: The law and economics of pirate organization. Journal of Political Economy 115, 1049–1094.
Leeson, P.T., 2007b. Better off stateless: Somalia before and after government collapse. Journal of Comparative Economics 35, 689–710.
Leeson, P.T., 2007c. Trading with bandits. Journal of Law and Economics 50, 303–321.
Leeson, P.T., 2008. The laws of lawlessness. Journal of Legal Studies 38, 471-503.
Osterfeld, D., 1986. Freedom Society and the State. San Francisco: Cobden Press.
Posner, R.A., 1994. What do judges and justices maximize? (The same thing everyone else does). Supreme Court Economic Review 3, 1-41.
Powell, B., Ford, R., & Nowrasteh, A., 2008. Somalia after state collapse: Chaos or improvement. Journal of Economic Behavior & Organization 67, 657-670.
Powell, B., Wilson, B., 2008. An experimental investigation of Hobbesian jungles. Journal of Economic Behavior and Organization 66, 669–686.
Powell, B., Stringham, E.P. 2009. Public Choice and the economic analysis of anarchy: A survey. Public Choice 140, 503-538.
Rosser, J.B., 2010. How complex are the Austrians? Advances in Austrian Economics 14, 165-179.
Rosser, J.B., Jr., Rosser, M.V., 2008. A critique of the new comparative economics. Review of Austrian Economics 21, 81-97.
Rothbard, M.N., 1973/1996. For a New Liberty. San Francisco: Fox and Wilkes.
Rowley, C.K, 1987. A public choice perspective on judicial pragmatism. In: James A. Dom and Henry G. Manne (Eds.). Economic Liberties and the Judiciary. Fairfax, VA: George Mason University Press, 219-224.
Salerno, J., 1993. Mises and Hayek dehomogenized. Review of Austrian Economics 6,113-46.
Sciabarra C.M., 2000. Total Freedom : Toward a Dialectical Libertarianism /. Published: University Park, PA : Pennsylvania State University Press.
Scott, J.C., 2009. The Art of Not Being Governed: An Anarchist History of Upland Southeast Asia. New Haven: Yale University Press.
Shughart, W.F., Tollision, R.D., 1998. Interest groups and the courts. George Mason University Law Review 6, 953-969.
Stephenson, M.C., 2009. Legal realism for economists. Journal of Economic Perspectives 23, 191–211.
Stringham, E.P., 1999. Market chosen law. Journal of Libertarian Studies 14, 53-77.
Stringham, E.P., 2002. The emergence of the London Stock Exchange as a self-policing club. Journal of Private Enterprise 17, 1-19.
Stringham, E.P., 2003. The extralegal development of securities trading in seventeenth century Amsterdam. Quarterly Review of Economics and Finance 43, 321-344.
Stringham, E.P., (Ed.) 2007. Anarchy and the Law: The Political Economy of Choice. Somerset, NJ: Transaction Publishers.
Stringham, E.P., Miles,C.J., 2010. Repelling states: Evidence from upland Southeast Asia. Review of Austrian Economics, forthcoming.
Stringham, E.P., Zywicki,T.J. 2010. Rivalry and superior dispatch: An analysis of competing courts in medieval and early modern England. Public Choice, forthcoming.
Tullock, G., 2005. Anarchy. In E.P. Stringham (Ed.), Anarchy, state and public choice (pp. 194–199). Cheltenham, UK: Edward Elgar Publishing.
Zywicki, T.J., 1998. Epstein and Polanyi on Simple Rules, Complex Systems, and Decentralization. Constitutional Political Economy 9, 143-150.
Zywicki, T.J., 2000. Was Hayek right about group selection after all? Review essay of Unto Others: The Evolution and Psychology of Unselfish Behavior by Elliott Sober and David Sloan Wilson, The Review of Austrian Economics 13(1), 81-95.
Zywicki, T.J., 2003. The rise and fall of efficiency in the common law: A supply-side analysis. Northwestern Law Review 97, 1551-1634.

Zywicki, T.J., 2006. Is forum-shopping corrupting America's bankruptcy courts. Georgetown Law Journal 94, 1141-1195.
Zywicki, T.J., 2008. Spontaneous order and the common law: Gordon Tullock's critique. Public Choice 135, 35-53.
Zywicki, T.J., Sanders, A.B., 2008. Posner, Hayek, and the economic analysis of law. Iowa Law Review 93, 559-604.
Zywicki, T.J., Stringham, E.P., 2010. Common law and economic efficiency. In F. Parisi and R. Posner (Ed.), Encyclopedia of Law and Economics.